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In The

Supreme Court of the United States

OCTOBER TERM, 1966

No. _____

RAYMOND CHARLES SMITH,

Petitioner,

v.

STATE OF OREGON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Raymond Charles Smith, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon entered in the above entitled case on March 12, 1967.

OPINION BELOW

The opinion of the court below (Appendix pp. 10-12) is reported at 426 P2d 463.

JURISDICTION

The judgment of the court below (Appendix p. 14) was entered on April 12, 1967. A timely petition for re-

hearing was denied on May 10, 1967 (Appendix p. 15). The Jurisdiction of this Court is invoked under 28 USC § 1257 (3).

QUESTION PRESENTED

May a State place upon a defendant in a murder case the burden of disproving criminal intent, malice, deliberation and premeditation and then limit him to M'Naughton rule insanity in doing so?

MANNER OF RAISING FEDERAL QUESTION

In the trial court defendant requested instructions embodying the Durham rule, the ALI rule, irresistible impulse and partial delusion test (Tr. V. IV., p. 673, 674). (Appendix p. 23)

Defendant also moved in arrest of judgment on the ground that the Oregon statutes placing this burden on defendant violated the *8th Amendment to the United States Constitution* adopted to the States by the due process and equal protection clauses of the *14th Amendment to the United States Constitution* in allowing punishment of a sick man and under a rule of uncertain application, varying throughout the United States. (Appendix p. 22) (Statutes at Appendix p. 16). The trial court let its jurisdiction expire without passing on this motion.

Failure of the Court in each respect by statute imports an exception to the defendant (Appendix p. 17).

On appeal these were assigned as error (Appendix pp. 22-23). The Supreme Court of Oregon considered

these and ruled against petitioner, stating that they were questions that Court has decided many times (Appendix p. 12).

CONSTITUTIONAL PROVISIONS APPLICABLE

8th Amendment, United States Constitution

Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

14th Amendment, United States Constitution

Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On July 30, 1965, defendant was charged with murder in the first degree by an

INDICTMENT

"Raymond Charles Smith is accused by the Grand Jury of the County of Multnomah and State of Oregon, by this indictment of the crime of FIRST DEGREE MURDER committed as follows:

"The said RAYMOND CHARLES SMITH on or about the 5th day of July, A.D. 1965, in the County of Multnomah and State of Oregon, did unlawfully and feloniously, purposely and of deliberate and pre-mediated malice, kill one Nancy Seeley by cutting her with a sharp instrument, a more particular description of said sharp instrument being unknown to the Grand Jury, contrary to the Stat-

utes in such cases made and provided, and against the peace and dignity of the State of Oregon." (Record p 1)

Defendant was arraigned on the indictment and on November 16, 1965 defendant pleaded not guilty and gave statutory notice of an insanity defense. (Record p 2, 16, Appendix p. 11)

Trial was begun on January 17, 1966, and concluded on January 21, 1966. Sufficient evidence was offered by the State from which a jury could have concluded defendant committed the act charged.

The defense was confined to the mental responsibility of defendant, two psychiatrists testifying on defendant's behalf.

Dr. Dixon's opinion was that the defendant at the time of the homicide neither knew what he was doing, nor could distinguish right from wrong (Tr. V. III, p. 422, 464, 469), would act without being governed by reason (Tr. V. III p. 422), was mentally ill, and the homicide was the product of this mental illness (Tr. V. III, p. 424, 425), and his opinion was based on the totality of defendant's mental makeup (Tr. V. III, p. 465-466).

Dr. Jens' opinion was that defendant's mentality was such that he could not act knowledgeably or have an intent or use reason (Tr. V. III, p. 485-487, 492, 495). This was based on the totality of defendant's mental condition (Tr. V. III, p. 504).

The police officer who arrested defendant stated he was intoxicated (Tr. V. I, p. 161, 162), and both Dr. Jens (Tr. V. III, p. 481, 482) and Dr. Dixon (Tr. V. III, p. 400, 401) testified to the increased effect of alcohol on Indians, which is petitioner's race (Tr. V. II, p. 278).

Both psychiatrists testified on the abnormal "spike" found on defendant's electroencephalograph (Tr. V. III, p. 398, 479), Dr. Jens noting that it was an error in brain function in the area where memory was recorded, perhaps a residual from a head injury (Tr. V. III, p. 479).

Dr. Campbell testified for the State in answer to a hypothetical question (he not having examined the defendant) essentially that his opinion was that defendant knew what he was doing and knew right from wrong because defendant had fled the scene of the crime (Tr. VIII, p. 583).

Dr. Campbell, the only accredited psychiatrist offered by the State, agreed defendant was mentally ill.

> "Q. From the way this matter was detailed to you, Doctor, by Mr. Hampton on his hypothetical, is that to you the picture of a normal, healthy mind?
>
> A. It is the picture of an unhealthy mind, but not necessarily a psychotic one.' (Tr. V. IV, p. 604.)

Dr. Simpson, a clinical psychologist at the State Hospital, testified as to tests given defendant (Tr. V. III, p. 546 et seq.) although she did not know it was the defendant who had taken one test (Tr. V. III, p. 552),

and on these and on interviews Dr. Newman, a psychiatrist in residence at the State Hospital, testified defendant was normal and healthy (Tr. V. III, p. 529 et seq).

The evidence of a delusion was that defendant believed he had caught his wife (by Idaho law, Tr. V. II, p. 318), in flagrante delicto (Tr. V. II, p. 329, 361, 380-383; V. III, p. 419-421, 477, 478, 496), with a negro named Roland Spencer (Tr. V. II, p. 323, 324), who had appeared as a State witness on the preliminary examination (Tr. V. II, p. 334, 335), but the police detective in charge of the case had never heard of this person (Tr. V. I, p. 94).

There was evidence of some real, some fancied prior instances of this (Exh. 58, Tr. V. II, p. 304, 305, 316, 317, 319, 378-380).

The trial court instructed the jury under Oregon law to the effect that if the State proved defendant killed, it would be legally presumed to be deliberate murder unless the defendant proved he was insane under the M'Naughton rule (Tr. V. IV, p. 645, 646, 647-651, Appendix pp. 18-22).

The trial court refused to give petitioner's requested instructions on partial delusion, Durham rule, ALI rule or irresistible impulse (Tr. V. IV, p. 673, 674, Appendix p. 23).

The jury found defendant guilty of murder in the first degree and the trial court sentenced him to life

imprisonment (Record pp. 4, 8). Defendant then filed a timely motion in arrest of judgment, claiming that the Oregon statutes on insanity and homicide violated the 8th Amendment of the United States Constitution adapted to the States by the due process and equal protection clauses of the 14th Amendment in allowing punishment of a sick man and under a rule of uncertain application varying throughout the United States (Record p. 5, Appendix p. 22). The trial court let its jurisdiction expire without acting on this.

These matters were assigned as error on appeal to the Supreme Court of Oregon, were considered by that Court as having been foreclosed by its prior decisions, and it affirmed the conviction (Record pp. 9 - 12, Appendix pp. 22-23).

REASONS FOR GRANTING THE WRIT

Since the Oregon law on insanity was passed upon by this Court in *Leland v. Oregon*, 343 US 790; 72 S. Ct. 1002; 96 L ed 1302 (1952), it has been strengthened to the detriment of the accused. It was pointed out by the Court in that case that under the instructions there the State had the burden of showing intent, malice, deliberation and premeditation beyond a reasonable doubt, and the defendant could have been found inocent because he was mentally incapable of such elements even though he was not legally insane.

Now, although Oregon law requires criminal intent, malice, deliberation and premeditation as elements of

the crime of murder, in Oregon they are presumed as a matter of law, and the defendant must disprove them, and only by resort to the M'Naughton rule, as instructed in this case (Tr. V. IV, p. 647-651, Appendix pp. 18-22). *State v. Gilmore*, —— Or. ——, 410 P2d 240 (1966).

It appears well established that under the Federal Constitution a person may not be punished for his mental illness. *Robinson v. California*, 370 US 660; 82 S. Ct. 1417, 8 L ed 2d 758 (1962); *Thead v. U.S.*, 354 US 278; 77 S. Ct. 1274; 1 L ed 2d 1342 (1957); *Easter v. D.C.*, DC Cir. 361 F2d 50 (1966); *Driver v. Hinnant*, 4 Cir. 356 F2d 761 (1966); *U.S. ex rel Robinson v. Pate*, 7 Cir. 345 F2d 691, 693 (1965).

But the M'Naughton rule is completely inadequate for determining this Federal question. *U.S. v. Freeman*, 2 Cir. 357 F2d 606 (1966); *U.S. v. Currens*, 3 Cir. 290 F2d 751 (1961); *Durham v. U.S.*, D.C. Cir. 214 F2d 751 (1954); *People v. Krugman*, 377 Mich. 559; 141 NW 2d 33 (1966); *State v. Shoffner*, 31 Wis. 2d 412; 143 NW 2d 458; *Terry v. Com.* —— Ky. ——; 371 SW 2d 862, 864-5 (1963); *Com. v. McHoul*, —— Mass. ——, 226 NE 2d 556 (1967).

Surely it is not appropriate that a person should go to the penitentiary for life in a State like Oregon, using such backward test, and go to a mental hospital in another State which uses a rational test?

CONCLUSION

Continued adherence to the outmoded M'Naughton rule test results in unjustified punishment of the mentally ill. This petition for a writ of certiori should therefore be granted.

Respectfully submitted,

HOWARD R. LONERGAN
812 Executive Building
Portland, Oregon 97204
Counsel for Petitioner.

APPENDIX

OPINION OF SUPREME COURT OF OREGON

SLOAN, J.

Defendant was convicted of murder in the first degree. While he was in jail awaiting indictment his attempts to commit suicide and other conduct caused the police to request the court that he be committed to the state hospital for safekeeping. Defense counsel and defendant participated in the hearings before the presiding judge in regard to defendant's safekeeping and agreed to a change of custody to the state hospital. The state also requested that the order transferring defendant to the state hospital should provide that defendant be examined by psychiatrists while he was confined in the state hospital to determine if defendant was able to discriminate between right and wrong and if he was capable of assisting in his defense. When the court specifically asked counsel: "Well, does the defendant have any objection to the form of order Mr. Hampton suggests be entered,—* * * that he be committted to the Oregon State Hospital for the purpose of determining his ability to assist in his own defense and determining the position as to whether or not he was mentally competent to know the difference between right and wrong at the time he committed the crime?" Counsel replied: "No, I have no objection to that." The order entered by the court provided for the examination.

Before defendant was examined by the hospital staff, one of the psychiatrists called defense counsel and informed him that defendant was to be examined and questioned for the psychiatric purposes expressed in the court's order. Defendant was not questioned for several days thereafter. Defense counsel made no protest to the examination, either to the court or to the psychiatrist. The psychiatrist reported to the court that defendant was able to understand right from wrong and was capable of participating in his defense. After this report was filed with the court, defendant entered a plea of not guilty by reason of insanity and served the statutory notice of that defense. Additional psychiatric examinations were made after the plea and before trial.

At defendant's trial, counsel objected to the testimony of the examining psychiatrist on the ground that the examination was made without counsel being present and that defendant was compelled to submit to the examination by the court order. The objection was not directed to any specific testimony of the psychiatrist. It was a general objection made to any testimony being received from the psychiatrist. The court overruled the objection and this is the basis of most of the argument on appeal.

The assignment of error is patently without merit. If there was any basis at all for the objection as made it was waived by the prior failure to object when the order was made and his failure to protest either to the court or to the psychiatrist when he had the opportunity be-

fore the examination. This is so even though the full purport of the court's order may not have been clear to counsel when he voiced no objection to the court at the time of the hearing. It certainly was clear to him that the examination was to be made when he was so telephonically informed by the psychiatrist at the state hospital.

Because of our decision we specifically do not decide that State v. Phillips, 1967, — Or —, 422 P2d 670, requires that counsel must be present when the psychiatric examination is made.

The other assignments are either related to the above assignment or concern questions that the court has decided many times.

The judgment is affirmed. (Record p 9)

JUDGMENT OF CIRCUIT COURT—JANUARY 26, 1966

On this 26th day of January, 1966, this case came before the court, the State of Oregon appearing by LEWIS B. HAMPTON, Deputy District Attorney, and the above-named defendant appearing in person and with his attorney, HOWARD R. LONERGAN,

IT IS ADJUDGED that the said defendant has been convicted on his plea of Not Guilty and verdict of GUILTY of the offense of FIRST DEGREE MURDER.

This being the time for imposition of sentence, and no reason appearing to the court why sentence should not be pronounced at this time,

IT IS ORDERED AND ADJUDGED that said defendant be imprisoned in the Oregon State Penitentiary for an indeterminate period, the maximum term of which shall be the remainder of his natural life; and it is further

ORDERED that said defendant be forthwith taken to the Oregon State Penitentiary. (Record p 8)

JUDGMENT OF SUPREME COURT—APRIL 12, 1967

This cause on March 6, 1967, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

IT FURTHER IS ORDERED that respondent have and recover of and from appellant its costs and disbursements in this court taxed at $15.00.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herein. (Record p 10)

PETITION FOR REHEARING—APRIL 24, 1967

Appellant petitions for rehearing of the appeal and for reversal of the judgment for the following error:

The Supreme Court has construed as a waiver of Federal Constitutional Right the failure of defense counsel to protest to the trial court or to the state psychiatrist before the examination, a procedure which was not in existence either by statute or Court decision prior to this decision, which unanticipated creation of a necessary procedure at a time when appellant could not avail thereof, violates the due process clause of *Section 1, Fourteenth Amendment* of the *United States Constitution.* (Record p 11)

SUPREME COURT ORDER DENYING REHEARING—MAY 10, 1967

The court having duly considered appellant's petition for rehearing, and the court being fully advised therein,

IT HEREBY IS ORDERED that said petition be and the same hereby is denied. (Record p 12)

STATUTES

163.010 Any person who purposely and of deliberate and premeditated malice * * * kills another, is guilty of murder in the first degree. * * *

(3) Any person convicted of murder in the first degree shall be punished by imprisonment for life.

136.390 Insanity at time of commission of acts as a defense. When the commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the same must be proved by the preponderance of the evidence.

136.400 Intoxication as a defense. No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existance of any particular motive, purpose or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

136.410 Morbid propensity to commit prohibited act as a defense. A morbid propensity to commit a prohibited act, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfullness of the act, forms no defense to a prosecution for committing the act.

17.510 * * * All adverse rulings except those contained in instructions given shall impart an exception in favor of the party against whom the ruling was made.

136.330 (2), ORS 17.505 to 17.515 and 19.100 apply to and regulate exceptions in criminal actions.

COURT INSTRUCTIONS

"I instruct you that the existence of deliberation and premeditation in the defendant's mind may be inferred from the facts proved. Direct proof of such deliberation and premeditation is not necessary. Its existence may be inferred from the tangible facts in evidence.

There is a presumption that a person intends the ordinary consequences of his voluntary acts and that an unlawful act was done and an unlawful intent of it. Furthermore, a malicious and guilty intent is presumed from the deliberate commission of an unlawful act for the purpose of injuring another. These presumptions must be considered by you in connection with all of the testimony in the case and may be rebutted as any other presumption deducible from the facts in evidence that the law does not make indisputable.

Furthermore, an intent to murder is presumed from the deliberate use of a deadly weapon causing death within a year. In this connection, I instruct you that a deadly weapon is a weapon by which death or serious bodily harm may be inflicted.

* * *

A presumption is a deduction which the law expressly directs to be made from particular facts.

* * *

Now, the law presumes every man to be sane until he establishes in the mind of the jury by a preponderance of the evidence the fact of his insanity. In other

words, the burden is upon the defendant to make out that defense by a preponderance of the evidence.

Now, it is not every eccentricity of mind, however well established, that will excuse the commission of an act otherwise criminal. The question of insanity has exclusive reference to the act with which the defendant is charged at the time of its commission, and it is his mental capacity at that time which the jury must determine.

So far as the capacity to form a criminal intent is concerned, it is sufficient to hold the defendant responsible if he had sufficient reason and understanding to know the nature, quality, and consequences of the act he was doing and to distinguish between right and wrong in relation to that act.

In considering defendant's understanding in this regard, you are entitled to consider all of the surrounding facts and circumstances concerning the alleged criminal act, such as the defendant's action and statements, if any.

Insanity need be established by a preponderance of the evidence only. It is different from the degree of proof of guilt of the crime charged in the indictment, because the burden of proving that crime is upon the State, and that burden carries with it the duty to prove it beyond a reasonable doubt.

By a preponderance of the evidence is meant the greater weight of the evidence, not necessarily the

greater volume of witnesses or the greater volume of evidence, but the more convincing evidence; that is, that evidence which satisfies your mind of the truth or falsity of any disputed fact in the case.

Now, you are instructed that you are to take into consideration the defendant's mental condition or illness, if any, at the time alleged, including intoxication and any brain damage or injury thereto, if any, in determining whether the defendant had intent or malice or passion or whether he deliberated or premeditated. And you are instructed that you are to take these matters into consideration to determine whether or not the defendant had the requisite intent or malice or passion in whole or in part and whether he deliberated or premeditated.

Now, any person who without malice, express or implied, without deliberation and upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kills another is guilty of manslaughter.

There is one instruction that I think that I read incorrectly, and I will withdraw that. It reads as follows, and I will withdraw that from your consideration and substitute this instruction, and that is the instruction with regard to this fact:

You are instructed that you are to take into consideration the defendant's mental condition or illness, if

any, at the time of the alleged incident, including intoxication, any brain damage or injury thereto, and so forth.

Now, I gave you that instruction and you will disregard that and you will accept this instruction in lieu thereof:

You are instructed that you are to take into consideration the defendant's mental condition or illness, if any, at the time alleged, including intoxication, any brain damage or injury thereto, if any, in determining whether such conditions in whole or in part deprived the defendant from having the requisite intent or malice or passion or whether he deliberated or premeditated.

Now, ladies and gentlemen of the jury, there is one further instruction I want to give you before mentioning the number of your body that must concur in order to reach a verdict in this case, and that is that the burden of proof rests upon the State in this case to establish beyond a reasonable doubt and to a moral certainty the truth of every material allegation in the indictment. And I have specified and called the same to your attention.

Now, this burden does not shift during the trial, but rests with the State to the close. In other words, besides the defense of insanity, upon which I have heretofore instructed you, the defendant is not required to prove anything. So, if after a careful consideration of all the evidence, there remains a reasonable doubt in your minds as to whether this defendant is guilty of the crime charged in the indictment or any of the lesser included

elements, subdivisions of that crime, as I have heretofore instructed you upon, it will then be your duty to give the benefit of such reasonable doubt to the defendant and return a verdict of not guilty.

If, on the other hand, you are satisfied beyond a reasonable doubt that the material allegations of the indictment have been established by the evidence, it will also likewise become your duty then to bring in a verdict of guilty." (Tr. V. IV, p. 645, 646, 647-651.)

ASSIGNMENT OF ERROR IV

The Court erred in denying the motion in arrest of judgment.

> "Defendant moves in arrest of judgment on the ground that it appears upon the face of the indictment that the facts stated do not constitute a crime, in that ORS 136.380 and 136.410 as interpreted, read with ORS 163.010 through 163.040, violate the 8th Amendment of the United States Constitution adopted to the States by the due process and equal protection clauses of the 14th Amendment of the United States Constitution, in allowing punishment of a sick man and under a rule of uncertain application, varying throughout the United States." (Trial Court File.) (Record p 5, App. Br. p 29)

ASSIGNMENT OF ERROR V

The Court erred in failing to give the following requested instruction:

> "If you find defendant has a mental disorder which irresistibly impelled him to commit this homicide, you are instructed that you should find him not guilty by reason of insanity." (Tr. V. IV p 673, App. Br. p 29)

ASSIGNMENT OF ERROR VI

The Court erred in failing to give the following requested instruction:

> "If you find the defendant had a mental disease at the time of committing the homicide and this homicide was the product of that disease, then you are instructed to find him not quilty by reason of insanity." (Tr. V. IV p 674, App. Br. p 25)

ASSIGNMENT OF ERROR VII

The Court erred in failing to give the following requested instruction:

> "You are instructed that defendant's mental illness or disease need not incapacitate him in all respects.
>
> It is enough if he have a partial delusion.
>
> If you find this to be so, you must consider his responsibility as if the facts with respect to which the delusion exists were real." (Tr. V. IV p 674)

Points and Authorities

1. It violates the due process and equal protection clauses of the Fourteenth Amendment, for a State to punish a mentally ill man on the basis of an inadequate M'Naughton rule statute.

Robinson v. California, 370 US 660; 82 S.Ct. 1417; 8 Led2d 758;

Thead v. U.S., 354 US 278; 77 S.Ct. 1274; 1 Led2d 1342;

Easter v. D.C., D.C. Cir. 361 F2d 50;

Driver v. Hinnant, 4 Cir. 356 F2d 761;

U.S. v. Freeman, 2 Cir. 357 F2d 606;

US ex rel Robinson v. Pate, 7 Cir. 345 F2d 691, 693;

U.S. v. Currens, 3 Cir. 290 F2d 751;

Durham v. U.S., D.C. Cir. 214 F2d 862;

People v. Krugman, 377 Mich 559; 141 NW2d 33;

State v. Shoffner, —Wis—; 143 NW2d 458;

State v. Colby, —O St.—, —NE 2d—;

Oregon Constitution, Art. I, Section 15.

2. Requiring a defendant to disprove criminal intent, malice, deliberation and premeditation in murder, and then allowing him to do so only by the M'Naughton

rule, likewise violates the due process and equal protection clauses of the Fourteenth Amendment.

cf. Leland v. U.S., 343 US 790, 794; 72 S.Ct. 1002, 1005; 96 Led 1302, 1306, 1307.

(Appellant's Brief pp 29-31)

SUPREME COURT, U. S.

SEP 5 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1967

No. 468

RAYMOND CHARLES SMITH,
Petitioner,

v.

THE STATE OF OREGON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

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August 31, 1967.

DAILY JOURNAL OF COMMERCE

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RAYMOND CHARLES SMITH,
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THE STATE OF OREGON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court below is reported at 426 P2d 463 and is set out in the Appendix of the Petition.

JURISDICTION

Respondent accepts petitioner's statement of jurisdiction.

QUESTION PRESENTED

Respondent disputes that the question stated by the petitioner is presented by the facts or law of this case. Respondent offers instead the following:

Is the application of M'Naughten's Rule of criminal responsibility to this petitioner so egregious and inappropriate as to be violative of constitutional due process?

MANNER OF RAISING FEDERAL QUESTION

Respondent accepts petitioner's statement with one exception. Petitioner's motion in arrest of judgment founded on Eighth and Fourteenth Amendment grounds was deemed denied by operation of law because petitioner did not set the matter for a hearing before the expiration of 55 days pursuant to ORS 136.810[1] and ORS 17.615.[2]

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Oregon statutes to be tested against the Eighth and Fourteenth Amendments of the United States Constitution, set out by petitioner, are these:

> ORS 136.390. When the commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the same must be proved by the preponderance of the evidence.
>
> ORS 136.410. A morbid propensity to commit a prohibited act, existing in the mind of a person who is not shown to have been incapable of knowing

1. ORS 136.810. "* * * The motion must be made within the time allowed to file a motion for a new trial * * *."

2. ORS 17.615. "* * * The motion shall be heard and determined by the court within 55 days from the time of the entry of judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied."

the wrongfulness of the act, forms no defense to a prosecution for committing the act.

STATEMENT OF THE CASE

In addition to the statement by petitioner, respondent sets out a narrative of the actual facts of the crime.

Petitioner lived with a 17-year-old girl, Nancy Seely, who had run away from home. Shortly after noon on July 5, 1965, petitioner asked the tenant of a neighboring apartment to call an ambulance. He said he had had a "drinking fight" with his "wife and hurt her." (R. 15.) He returned two more times and repeated his request (R. 16 and 17). He appeared to have been drinking but was not drunk (R. 23). There was blood on his shirt on the second visit (R. 29).

At the request of the neighbor, a nurse went to petitioner's apartment where the victim lay comatose. Petitioner was upset and excited at the victim's condition, but was otherwise quiet, polite (R. 62) and apparently sober (R. 54). He urged resuscitation and plasma for the victim, and explained that he had stabbed her (R. 59). The petitioner fled as soon as the police arrived and became visible (R. 51).

The victim died of two knife wounds (R. 234, 249). She also suffered extensive bruises, cuts and other in-

juries to her eye, mouth, neck, chin, shoulder, arm, thighs and scalp (R. 236-239). Her hyoid bone was torn apart, apparently due to choking by the hands (R. 244-245).

When the police informed petitioner that he was charged with murder, his response was, "She kept crowding me. She kept pushing, and she doesn't understand me." (R. 116.)

REASONS FOR DENYING THE WRIT

Briefly summarized, the state of the law of criminal responsibility in Oregon is this: A defendant urging a defense of insanity has the burden of proving insanity under M'Naughten's rule by a preponderance of the evidence (formerly by proof beyond reasonable doubt). Mental condition short of criminal insanity may be considered as to intent. The Irresistible Impulse test is not applicable. ORS 136.390 and ORS 136.410; *State v. Leland*, 190 Or 598, 227 P2d 785 (1951), affd sub nom *Leland v. Oregon*, 343 US 790 (1952).

In the *Leland* case the Supreme Court of the United States had occasion to review the statutory scheme of Oregon. While it neither approved or disapproved, the Court found the Oregon standard consistent with the demands of the Fourteenth Amendment in this language:

> "The science of psychiatrity has made tremendous strides since that test was laid down in M'Naughten's case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law." *Leland v. Oregon*, 343 US at 800.

Nothing since 1952 has affected the continuing applicability of the good sense of the *Leland* opinion. Petitioner's citations reflect experiment, ferment and change in certain jurisdictions. That is a healthy process, but it has not as yet produced a standard so compellingly sound that it would require this Court to mandate each state to apply it to the exclusion of any other standard.

It has been ably suggested that the various jurisdictions have over-conceptualized varying definitions of insanity; that the actual distinctions between M'Naughten, Durham, ALI, and the rest are differences of semantics, but not of substance; that the differences are of negligible value so long as the jury is exposed to a thorough exposition of defendant's mental state; that the jury will arrive at the same sound result regardless of the words in which the instruction is framed so long as that instruction comprehends the elements of cognition, volition and capacity to control conduct. *Pope v. United States*, 372 F2d 710, 735-736 (8th Cir. 1967).

The jury was presented a full and complete exposition of this petitioner's mental condition. A review of the facts and the psychiatric testimony reveal that petitioner has failed to make a persuasive case regardless of which formulation is applied. Insanity was clearly a defense of convenience. The facts of this particular case fall far short of the magnitude which would require this Court to reverse its clear-cut holding in *Leland v. Oregon, supra,* upon which the court of this and other states have firmly relied for 15 years.

Petitioner seeks unsuccessfully to portray himself as one so mentally ill as to demonstrate the gross injustice of the M'Naughten rule. A summary review of the expert testimony shows that image to be greatly magnified by self-interest. Not even petitioner's own psychiatrists support such an idea. Dr. Dixon, Jr., said, in sum, that although petitioner was able to premeditate and deliberate (R. 423-424), despite some paranoid tendencies (R. 409), petitioner was prone to act impulsively, particularly when drinking. Dr. Dixon concluded that he was so acting at the moment of the homicidal act (R. 421-422), without regard for right or wrong.

Dr. Jens testified similarly, but never stated a conclusion as to whether petitioner acted appreciatively or with knowledge of right and wrong.

The synthetic quality of petitioner's attempt to fashion criminal insanity where the facts do not support him, is reflected in his reassertion of the existence of the electroencephalographic "spike." Petitioner hopes to profit from the recital of scare-words, but the fact is that neither defense psychiatrist attached any relevant significance to the "spike" (R. 442, 479-480) despite counsel's efforts otherwise. That is not the sort of foundation upon which the Supreme Court should predicate a review of the law of insanity.

Testifying for the state, Dr. Newman of the Oregon State Hospital said that he found no evidence to suggest legal insanity (R. 533) and that petitioner was not mentally ill except for a depression probably related to petitioner's present legal difficulties (R. 535-537).

Dr. Simpson, a clinical psychologist at Oregon State Hospital, concluded from a battery of tests that petitioner was brighter than average, showed no organic or pathological impairment whatsoever and, although depressed, petitioner was not psychotic (R. 547-548, 554), that petitioner had a paranoid tendency not unusual among persons who are oriented to their surroundings (R. 549).

Petitioner's reference to partial delusion, i.e., that petitioner thought that he had caught Nancy Seely in bed with a Negro man, finds no support in the testi-

mony. Counsel may have desired to prove it, but he gave no evidence. To the contrary, there was evidence that petitioner was angered at Nancy Seely because she refused to obey petitioner's instructions to have intercourse with other men (R. 342-345).

The instructions given the jury reflect a standard definition of M'Naughten's Rule and, in addition, required them to consider petitioner's mental condition in determining questions of intent, malice, passion and deliberation. The latter idea is reflected in this instruction:

> "You are instructed that you are to take into consideration the defendant's mental condition or illness, if any, at the time alleged, including intoxication, any brain damage or injury thereto, if any, in determining whether such conditions in whole or in part deprived the defendant from having the requisite intent or malice or passion or whether he deliberated or premeditated." (Appendix to Petition 21.)

The facts were entirely before the jury under instructions which allowed them to construe them with good sense. They wisely rejected the offered but unsupported defense.

Petitioner's attempt to bring this case under the umbrella of *Robinson v. California*, 370 US 660 (1962), should fail. Petitioner is not being incarcerated for his mental illness; he was sentenced for murder.

In sum, respondent's position is twofold:

1) *Leland v. Oregon, supra,* is correct and dispositive. No formulation of criminal responsibility has yet achieved the degree of legal and psychiatric acceptance which would compel universal application of such standard in all jurisdictions as a matter of due process right.

2) If the Court feels that the time has come for re-examination of standards of criminal responsibility in light of the Eighth and Fourteenth Amendments, this case presents a totally inadequate record upon which to found the sort of momentous and wide-reaching policy decision which would be forthcoming from such an examination. When looking to the entire testimony of each psychiatrist rather than to a few bare phrases of some of them, it is clear that petitioner is simply not criminally insane in any commonly accepted sense.

CONCLUSION

Petitioner disapproves of the standard of criminal insanity which is approved by the legislature and Supreme Court of the State of Oregon. In its place he fails to suggest a standard so compelling to reason that due process compels its acceptance to the exclusion of all other rules. Until such a standard comes to the fore, there is no justification for countermanding the Legislature and Supreme Court of Oregon. The record further

fails to provide facts and psychiatric foundation which demonstrate the purported lack of wisdom of the Oregon test or the injustice of its application to petitioner. Were this Court to grant the petition for a writ of certiorari, it would be compelled to make a decision which would shake the criminal law by its four corners upon a record which provides negligible data. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 31, 1967.

In The

Supreme Court of the United States

OCTOBER TERM, 1967

No. 468

RAYMOND CHARLES SMITH,
Petitioner,

v.

STATE OF OREGON

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Respondent's Brief in Opposition, at page 2 under the heading "Manner of Raising Federal Question", states:

> "Respondent accepts petitioner's statement with one exception. Petitioner's motion in arrest of judgment founded on Eighth and Fourteenth Amendment grounds was deemed denied by operation of law *because petitioner did not set the matter for a hearing before the expiration of 55 days pursuant to ORS 136.810*[1] *and ORS 17.615*[2]." (emphasis supplied.

This is not the fact. Petitioner did bring on the motion in arrest of judgment for timely hearing before the trial judge at the same time as the motion for a new trial.

Said judge did not decide this motion but allowed his time to expire so that it was "deemed denied" by operation of the cited statutes. (The trial judge did decide the accompanying motion for a new trial, however.)

Unfortunately the record presently before this Court does not show this since it was not anticipated this claim would be made at this time when such claim was not asserted by Respondent before the Supreme Court of Oregon when this issue was presented to (Appendix to Petition pp. 22-23) and decided by that Court (Appendix p. 12).

A Supplemental Record including the transcript of the hearing before the Circuit Court on the motions for new trial and in arrest of judgment, and the Notice of Appeal to the Supreme Court of Oregon asserting as one of the grounds for appeal:

> "5. The Court erred in denying motion in arrest of judgment",

has been obtained for forwarding with this Reply.

Respectfully submitted,

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